STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of C.I.D. REFUSE SERVICE, INC. for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1987 through January 28, 1990.	: : : : :	DETERMINATION DTA NO. 809934

Petitioner, C.I.D. Refuse Service, Inc., 10860 Olean Road, Chaffee, New York 14030, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1987 through January 28, 1990.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 6, 1993 at 9:30 A.M., with all briefs to be submitted by April 11, 1994. Petitioner filed its brief on December 6, 1993. The Division of Taxation filed a brief on March 21, 1994. Petitioner appeared by Cohen & Lombardo, P.C. (Donald A. Fisher, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioner's purchase of waste containers were purchases for resale within the meaning of Tax Law § 1101(b)(4) and, thus, not subject to the imposition of sales tax.

FINDINGS OF FACT

Petitioner, C.I.D. Refuse Service, Inc., operates a garbage collection service. Its income was derived from providing service to threegroups of customers: commercial, industrial and domestic. Petitioner maintained a separate sales journal for each type of customer. However, petitioner reported all of its sales on the same sales tax return. All of petitioner's purchase and expense records were kept at the same location.

On the basis of a field audit, the Division of Taxation ("Division") determined that sales and use taxes in the amount of $931.39 were due on additional taxable sales. The Division also found that tax in the amount of $1,072.12 was due on expense purchases. Lastly, the Division concluded that tax in the amount of $27,493.66 was due on asset purchases of $343,670.15. The asset purchases consisted of miscellaneous asset acquisitions and of purchases of containers. The miscellaneous asset acquisitions by petitioner resulted in tax due of $1,829.51. The remaining amount of tax of $25,664.15 was the amount that the Division found was due on container purchases. The Division concluded that petitioner's purchase of containers was taxable because they were not being resold but were being used for a service.

After the audit, petitioner agreed with all of the audit findings except for the tax due on container purchases.

The Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated August 30, 1990, which assessed sales and use taxes in the amount of $25,664.15, plus interest of $5,548.40, for a total amount due of $31,212.55. Since petitioner agreed with a portion of the audit, the amount of tax which the Division assessed in the notice was based on the amount of tax which the Division contends is due on petitioner's purchase of containers.

The letters C.I.D. in petitioner's name stand for the three types of customers which petitioner services -- commercial, industrial and domestic. Petitioner has a separate department for each type of service.

Each department has separate equipment and separate drivers. In general, a driver is assigned his own truck and works in one of the three departments. Nevertheless, there are occasions where a driver is used interchangeably between departments.

There are different billing practices for each of the departments. Industrial businesses are billed monthly for services previously rendered. Commercial businesses are billed monthly for services to be rendered. Domestic customers are billed twice a year.

Petitioner does not bill its domestic customers for rentals. However, commercial and industrial customers are issued bills which separately state a rental charge.

Each container is assigned a number which is reflected in a journal which shows the size of the container, the date purchased and whether the container is assigned. If the container is assigned, the journal also shows to whom the container is assigned.

Containers can be rented for one year or three years. Petitioner's contract with its customers for commercial and domestic waste provided, in part:

> "**CUSTOMER'S DUTIES AND LIABILITY.** The equipment shall be in the possession and control of the Customer. Customer agrees to hold harmless and indemnify Contractor against all claims, lawsuits and any other liability for death or injury to persons, or damage to property arising out of the possession or use of the equipment by the Customer, including any liability for negligence. Customer shall be responsible for the cleanliness and safekeeping of the equipment. All equipment furnished by the Contractor for use by the Customer which the Customer has not purchased, shall remain the property of the Contractor and the Customer shall have no right, title or interest in it. Customer shall not make any alterations or improvements to the equipment without the prior written consent of the Contractor."

During the period March 1, 1987 through December 31, 1987, petitioner's commercial customers paid rental charges of $127,099.77 which were 17.1% of total commercial revenues of $745,350.12. For the year 1988, petitioner's commercial customers paid rental charges of $162,400.66 which were 17.1% of total commercial revenues of $948,120.06. For the year 1989, petitioner's commercial customers paid rental charges of $125,462.08 which were 14.7% of total commercial revenues of $852,179.52. The foregoing percentages do not reflect customers who were charged only for rentals and not a service.

During the period in issue, petitioner had approximately 1,500 commercial customers. Approximately 10% of the customers rented containers without an associated service. At the hearing, petitioner's president testified that, although he could not recall it happening, it was possible for a container to be used for only rental purposes with one customer and, at a later time, the same container could be used by the same or another customer in conjunction with a service. The number assigned to a container would not change if the container were transferred from one customer who had only a rental to another customer who had both a rental and a service. Petitioner's records would indicate who had that numbered container. He also explained that a container was not designated as only a rental container.

SUMMARY OF THE PARTIES' POSITIONS

In its brief, petitioner challenges the Division's position that petitioner's customers are actually purchasing a taxable trash or waste removal service and that the containers are incidental to the waste removal service. Petitioner submits that the situation at issue herein is distinguishable because: (1) petitioner purchases containers that are rented to customers to whom petitioner provides no collection service; (2) petitioner's rental practices are such that its customers may rent containers for periods of one or three years; (3) petitioner bills its customers separately for container rental charges; (4) petitioner's collection of trash has no connection to the rental charges; (5) the rental charges for containers are a significant part of petitioner's business revenue representing up to 17% of gross sales during the years 1987 through 1989; and (6) the equipment is rented by petitioner to its customers on an exclusive basis. Petitioner's brief proceeds to argue that petitioner's purchases of containers were purchases for resale. Relying upon a determination by an Administrative Law Judge, petitioner submits that its case is distinguishable from U-Need-A-Roll Off Corp. v. New York State Tax Commn. (67 NY2d 690, 499 NYS2d 921) since petitioner has separate invoices for rental charges and bills rental charges separately. Next, petitioner submits that its rental of containers is a component of its business rather than a mere incident to it. Lastly, petitioner contends that the containers were purchased exclusively for rental.

In response to the foregoing, the Division contends that petitioner's primary business activity is providing trash removal services. It is argued that there is no valid showing that the provision of containers was anything other than integral to trash removal services despite those customers who received containers without trash removal services. The Division submits that the itemization of charges on petitioner's invoices does not prove that petitioner renders more than one service.

The Division also argues that petitioner failed to establish that the containers were purchased exclusively for resale. It is submitted that the intent was to purchase the containers for use as either for trash removal or as containers. Therefore, the containers were not purchased exclusively for resale.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax upon the receipts from retail sales of tangible personal property with certain exceptions which are not germane. The term "retail sale" is defined as the sale of tangible personal property to any person for any purpose other than for resale (Tax Law § 1101[b][4][i]). An individual who purchases an item for the purpose of sale or rental, purchases it for resale within the meaning of the statute (Albany Calcium Light Co. v. State Tax Commn., 44 NY2d 986, 408 NYS2d 333).

Property is not purchased for resale by a vendor which incidentally supplies tangible personal property to its customers in conjunction with the rendering of a taxable service, where there is no separate charge for the property (Albany Calcium Light Co. v. State Tax Commn., supra; U-Need-A-Roll Off Corp. v. New York State Tax Commn., supra). In addition, it has been held that in order to qualify for the resale exclusion, the tangible personal property must be purchased exclusively for the purpose of resale (Micheli Contr. Corp. v. New York State Tax Commn., 109 AD2d 957, 486 NYS2d 448; Matter of AGL Welding Supply Co., Tax Appeals Tribunal, April 28, 1994).

B. Relying principally upon U-Need-A-Roll Off Corp. v. New York State Tax Commn. (supra) and Waste Management of New York v. Tax Appeals Tribunal (185 AD2d 479, 585 NYS2d 883, lv denied 80 NY2d 762, 592 NYS2d 670), the Division contends that the rental activity is merely incidental to the trash removal services provided.

C. The Division's argument is rejected. In U-Need-A-Roll Off Corp., the taxpayer was a trash removal company. On occasion, the taxpayer would rent a container without providing a trash removal service. However, the taxpayer did not separately charge for the rental in either the bill or in the fee structure. Ultimately, the Court of Appeals held that the fact that the invoices did not set forth a separate rental charge for the use of the containers provided substantial evidence for the State Tax Commission's determination that the taxpayer's transactions with its customers did not involve a rental of tangible personal property.

In Waste Management, the taxpayer was in the business of waste removal. The taxpayer's billing practices varied. Among other things, the record showed that for compactors, the petitioner's service agreement and invoices separately stated a charge per haul to dispose of the customer's waste. For containers, the petitioner sometimes separately stated a use charge and a charge per haul and sometimes did not. The more frequently the dumping service was used, the greater the likelihood that a customer would receive a more favorable "use" charge.

The Tax Appeals Tribunal concluded that U-Need-A-Roll Off Corp. presented substantially identical facts and therefore the purchases of containers were retail sales. The Tribunal noted, among other things, that: nearly all of the customers paid for both the use of the equipment and trash removal services; that after the equipment remained on the customer's property for some period of time, the taxpayer would reclaim the equipment; and that the taxpayer's charges in both instances reflected the artificiality of the separation of charges for a service component and a use component.

The Tribunal also held that the phrase "actually transferred" within the meaning of Tax Law § 1101(b)(4)(i)(B) required a permanent transfer. Since the equipment could be reused by the vendor, this condition was not satisfied. Lastly, the Tribunal found that charges related to the provision of the equipment could not be separated from the waste removal service.

In the Article 78 proceeding which followed, the court held that U-Need-A-Roll Off Corp. was properly considered persuasive authority and that the Tribunal could properly interpret the phrase "actually transferred" as requiring a permanent transfer (Waste Management of New York v. Tax Appeals Tribunal, supra).

D. In this case, 10% of petitioner's commercial customers rented containers without any associated service. Under these circumstances, the rental of the containers was a significant part of petitioner's business. Further, unlike either U-Need-A-Roll Off Corp. or Waste Management, the record shows that petitioner made a practice of separately billing for the rental of the containers and the removal of trash. In addition, there is nothing in the record to suggest that the charge for the rental was influenced by the number of times a customer had waste removed.

Under these circumstances, it is concluded that petitioner's rental business was independent of the trash removal services.

E. The Division's second argument is that the containers were not purchased exclusively for resale. As noted, in order to be excluded from tax, the purchaser of the containers must have been exclusively for resale (Valley Welding Supply Co. v. Chu, 131 AD2d 917, 516 NYS2d 366; Micheli Contr. Corp. v. New York State Tax Commn., supra; Matter of AGL Welding Supply Co., supra).

F. Here, petitioner's president candidly acknowledged that containers were not designated as only rental containers. Further, although it may never have happened, it was possible for customers to start out renting a container and decide later that they also wanted a service using the same container. Since petitioner was willing to use its containers interchangeably, the purchase of all of the containers was subject to sales and use taxes (Matter of AGL Welding Supply Co., supra).

G. An additional consideration supporting the Division's conclusion that the purchase of the containers is taxable is that the phrase "actually transferred" means a permanent transfer (Waste Management of New York v. Tax Appeals Tribunal, supra). In this instance, the terms of petitioner's contract with its customers establish that the containers are not permanently transferred to the customer.

H. The determination by the Administrative Law Judge was not discussed since said determination may not be cited for precedent (Tax Law § 2010[5]).

I. The petition of C.I.D. Refuse Service, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated August 30, 1990, is sustained together with such interest as may be lawfully due.

DATED: Troy, New York
October 6, 1994

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE